United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original - Affidavit of Mailing

73-2842

To be argued by
HAROLD J. FRIEDMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 73-2842

GEORGE BIDERMAN, CHARLES S. LOWRY, MICHAEL FRY, ANNE FRY, W. DAVID ANDERSON, MYLES S. FREHM, NORMAN VALE, J. SALKELD RIDER, ALAN HALSTEAD, WARNER DANBY, KATHLEEN ELGIN, FREDERICK TAUSSIG, HELEN FLY, LORRIN C. MAWDSLEY, ROBERT SPENCER, PETER SHEPHERD and EMILY MARKS,

Plaintiffs-Appellants,

—*against*—

ROBERS C. B. MORTON, Secretary of Interior, GEORGE B. HARTZOG, JR., Director, National Park Service, CHESTER BAKER, Regional Director of Northeast Region, National Park Service, JERRY WAGERS, Superintendent, New York Group, National Park Service, JAMES W. GODBOLT, Superintendent, Fire Island National Seashore, National Park Service, PETER F. GOHALAN, Islip Town Supervisor, CHARLES BARRAUD, Brookhaven Town Supervisor, ARTHUR SILDORF, Mayor, Village of Ocean Beach, ROBERT S. WRIGHT, Mayor, Village of Saltaire, WILLIAM SCHERMERHORN, Chairman, Islip Board of Appeals, JOHN LUDLOW, Chairman, Saltaire Board of Appeals, BENJAMIN EPSTEIN, Chairman, Ocean Beach Board of Appeals, CARLOS CRUZ, Director of Building Department, Islip, ALBERT CARNES, Director of Building Department, Brookhaven, BRUCE KAHLER, Building Inspector, Saltaire, and EDWARD DATTNER, Building Inspector, Ocean Beach,

Defendants-Appellees,

CONSTITUTIONAL RIGHTS COMMITTEE OF KISMET,

Intervenor-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE FEDERAL-APPELLEES

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CONSTITUTIONAL RIGHTS COMMITTEE OF KISMET,

Intervenor Appellee-
Cross-Appellant.

BRIEF FOR THE FEDERAL-APPELLEES

PRELIMINARY STATEMENT

On August 9, 1972, plaintiffs commenced an action in their individual capacities and in some instances as

representatives of property owner organizations within the Fire Island National Seashore (hereinafter "Seashore") against the Secretary of the Interior (hereinafter "Secretary"), the Director of the National Park Service (hereinafter "NPS"),* subordinate officers of NPS and officials of the Towns of Islip and Brookhaven and the Incorporated Villages of Ocean Beach and Saltaire. With reference to Federal defendants, plaintifffs are seeking, inter alia, a declaration that the Secretary must prepare as soon as practicable an environmental impact statement (hereinafter "EIS") for the Seashore, which plaintiffs claim is required by the National Environmental Policy Act, 42 U.S.C. §4321 et seq. (hereinafter "NEPA");** that the Secretary has the authority and responsibility to regulate motor vehicle traffic throughout the Seashore, on non-federal as well as federal lands and that the Secretary's failure to acquire ocean beaches in the developed communities violates the Fire Island National Seashore Act (16 U.S.C. §459 et seq.) (hereinafter "Seashore Act"). Plaintiffs are also seeking an order requiring the Secretary to acquire ocean beaches as soon as practicable.

On November 8, 1972, Federal defendants and Brookhaven officials moved to dismiss the complaint on several grounds

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* The Seashore is administered by the NPS.

** Federal defendants are preparing a master plan for the long range management of the Seashore which will include new motor vehicle regulations and an EIS on the master plan. The target date for completion is January, 1975.

and on February 6, 1973, the District Court (Dooling J.) denied their motions. On August 22, 1973, one year after the suit was commenced, plaintiffs moved for a preliminary injunction seeking to enjoin all defendants from approving, issuing, granting or authorizing the following: (a) building permits for commercial use, multiple occupancy or for swimming pools; (b) variances or exceptions to existing zoning regulations; (c) changes or amendments to existing zoning regulations which reduce acreage, frontage or set back requirements; (d) any building permit for construction forward of the dune line or inland up to 100 feet behind the dunes; (e) any building permit for construction on wetlands and watercourses including filling or dredging on the wetlands and water courses; and (f) motor vehicle permits except under certain limited circumstances where such travel is "essential".

On September 10, 1973, the District Court denied plaintiffs' motion for a preliminary injunction as to items (a) through (e) and held item (f) in abeyance*. Plaintiffs

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* Judge Dooling held the question of motor vehicles in abeyance because NPS had planned to prepare interim regulations. Subsequently, NPS decided that the best course would be to have new motor vehicle regulations accompany the master plan and EIS rather than a piecemeal approach of interim regulations promulgated before the master plan is completed.

appealed from the denial of the preliminary injunction with respect to items (a) through (e). On May 30, 1974, this Court affirmed Judge Dooling's denial of plaintiffs' motion for a preliminary injunction as to items (a) through (e). Biderman v. Morton, 497 F.2d 1141 (2d Cir. 1974). Thereafter, a four day evidentiary hearing was conducted by Judge Dooling on June 25, 27, 28 and July 3, 1974, as to item (f) of plaintiffs' motion on the question of motor vehicles. At this hearing, plaintiffs called several witnesses, including Mr. Jerry Wagers, Director Northeast Region NPS, 2 scientists - Doctor Coates and Mr. Schuberth, Fire Island residents and the mayors of two Fire Island villages. Federal defendants called as witnesses Ranger Ott and Park Technician Johnson. Intervenors, the Constitutional Rights Committee of Kismet (hereinafter "Intervenors") called Dr. Wolff, a scientist, and several residents of the Fire Island community of Kismet.

Intervenors cross moved for a preliminary injunction ordering NPS to issue their members motor vehicle permits as they claim that the existing motor vehicle regulations are too strict and that the regulations are unfairly applied to Intervenors.

On July 19, 1974, Judge Dooling denied plaintiffs' and intervenors' respective motions for a preliminary injunction finding that:

> The evidence fails to show that the incremental environmental effect of continuing to issue permits for such private vehicles over and above the environmental effect of the use of the Island for vacation habitation and for the indispensible vehicles now desirably exempted from constraint has significant dimensions either in number of vehicles, extent of unavoidable authorized effect on the terrain or time-cumulative consequence as an aggregate of individual effects. Cf. Gage. United States Atomic Energy Commission, D. C. Cir. 1973, 479 F.2d 1214, 1221. Memorandum and Order Page 24.

On appeal, plaintiffs assert that NEPA requires an EIS in connection with NPS administration of the motor vehicle regulations, 36 CFR §7.20, et seq., for the Seashore, notwithstanding the fact that the regulations were promulgated in 1968, before the 1970 enactment of NEPA, and that a preliminary injunction should issue to halt "non-essential" motor vehicle traffic on the Seashore until such time as an EIS is prepared on the regulations.

Federal defendants submit that there is one limited issue before this Court -whether Judge Dooling abused his discretion in refusing to enjoin Federal defendants. Plaintiffs failed to demonstrate the legal necessity under NEPA for Federal defendants to file an EIS prior to the issuance of the master plan and new motor vehicle

regulations for the Seashore. NEPA does not apply to the existing motor vehicle regulations because the regulations were enacted before NEPA. Arguendo, even if NEPA did apply to these regulations, the issuance of motor vehicle permits on an individual basis is not a "major federal action".

Judge Dooling correctly took into account that since a master plan is on the eve of completion, little purpose would be served by granting the relief sought as the regulations have represented the status quo since 1968. In addition, plaintiffs failed to show that irreparable harm will result if Federal defendants were not enjoined and in fact the public interest requires that the existing regulations remain in effect until such time as the master plan and EIS are completed.

STATEMENT OF FACTS

The Seashore Act, 16 U.S.C. §459, et seq. enacted in 1964, authorized the establishment of the Fire Island National Seashore "for the purpose of conserving and preserving, for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features" on Fire Island, 16 U.S.C. §459(a). Pursuant to the Secretary's statutory responsibility to preserve the Seashore and make it available to the public, NPS promulgated motor vehicle regulations in an effort to restrict and regulate the use of motor vehicles on Fire Island,* 36 C.F.R. §7.20, et seq.

The Seashore is divided into a western and an eastern unit for purposes of NPS administration. There are two points of terrestrial ingress and egress to the Seashore; on the west, the Kismet lighthouse area that is near the Robert Moses bridge; on the east, the Smith County Park that is near the Smith County Park Bridge. These are the only bridges between Long Island and Fire Island. The Seashore runs approximately 32 miles. The Kismet Lighthouse is located on a road that begins at the Robert Moses State Park. On this road there are approximately six signs indicating that travel on the Seashore is prohibited without an NPS permit

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* Motor vehicles were used on Fire Island long before the 1964 enactment of the Seashore Act.

(Johnson, p. 607 l. 3-8).*

Under NPS regulations, only those vehicles with NPS permits may travel on Federal property within the Seashore. The general categories of motor vehicle permits are "annual", "limited term", "recreational" and "service".** Permits are not required for official NPS, county, town or village vehicles. With each permit application, NPS must determine on an individual basis "whether or not the nature and extent of the intended use is consistent with the purposes of the regulations . . . which are to protect the seashore lands and interests therein, to protect the health and safety of members of the public using the seashore, and to provide for the recreational use of motor vehicles for activities such as sports, fishing and hunting in areas and at times which do not conflict with the conservation of the natural resources of the seashore." 36 CFR §7.20(a)(i). Generally, no permits are issued for vehicles weighing more than one ton and under no circumstances are permits issued for vehicles not equipped to travel over sand. No permits are issued by NPS unless the applicant has first acquired a town or village permit. 36 CFR §7.20(a)(2)(vii).

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* These references are to the witness, and the page and line of the transcript of the evidentiary hearing.

** Plaintiffs do not oppose the issuance of recreational permits that are primarily used on the eastern end of the Seashore. (Cohn, p. 591 l. 17-21). Plaintiffs live on the western end of the Seashore.

Under Section 7.20(a)(3) motor vehicle travel from May 15 through September 14 is allowed daily from 6:00 P.M. to 9:00 A.M. From September 15 through November 10 travel is permitted at any time except from 9:00 A.M. through 6:00 P.M. on Saturaday and Sunday and from November 11 through May 14 travel is permitted at any hour.

Over the last three years, the number of annual permits issued has decreased while the number of limited term permits issued has increased (Federal defendants' answer to plaintiffs' interrogatory 20). This is the result of a conscious effort on the part of NPS to reduce summer travel, the bulk of which has been done on annual permits. The net effect has been a reduction in the number of vehicles on the Seashore in the summer (Ott, p. 590 l. 12-18).

The testimony of Mr. Jerry Wagers, Regional Director, Northeast Region, NPS and the numerous government documents introduced by plaintiffs into evidence through Mr. Wagers' testimony show that there is a long history of NPS concern and contemplation of the future course of motor vehicle use on the Seashore. NPS has determined that motor vehicle use on the Seashore should be reduced and, short of new regulations that are now being finalized, NPS has taken numerous steps

to curtail motor vehicle use on the Seashore.* As previously mentioned, as a result of a decrease in NPS issuance of annual permits, with an increase in NPS issuance of limited term permits, the net effect has been a positive one, a decrease in summer motor vehicle traffic on the Seashore.

Judge Dooling observed the protection afforded by the regulations to the fragile dunes on the Seashore:

> The guidelines reflect particulary concern for the back dunes area and the importance of seeking to control the routes that vehicles pursue with particular reference to routing traffic along the beach front. Memorandum and Order, page 9.

In addition, Judge Dooling noted NPS' concern and good faith efforts at reducing motor vehicle use on the Seashore.

> The testimony of the goverment's witnesses and the evidence produced from the government's files indicate a complete and sympathetic and insightful concern with the use of motor vehicles on the Island together with a consciousness that some measure of motor vehicle use is inseparable from continued use of the Island by people... The government has made a substantial effort and continues to make an increasingly substantial effort to enforce the Regulations... There is, however no reason to doubt that the enforcement effort is present, substantial and conducted in good faith. Memorandum and Order, pages 10, 16.

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* Plaintiffs have conceded that NPS motor vehicle enforcement improved substantially in the summer of 1974 (Cohn, p. 665 l. 16-20). In the summer season, motor vehicle use on the Seashore is also at its peak (Johnson, p. 662 l. 20-25).

The current NPS policy regarding the issuance of private motor vehicle permits is that if an applicant has reasonable access off and on to the Seashore by ferry, the applicant will not be granted a motor vehicle permit (Ott, p. 588 l. 10-15). Intervenors, contrary to plaintiffs' claims that the regulations are too liberal, complain that these regulations are too limiting.

The informed professional opinion of NPS personnel involved on a full time basis with motor vehicle enforcement is that violations over the past four years have decreased, and this is evidenced by the general reduction in NPS motor vehicle citations (Federal defendants' answer to plaintiffs' interrogatory 21; Ott, p. 597 l. 23 - p. 598 l. 5; Johnson, p. 668 l. 13 - p. 669 l. 10). This is contrary to the testimony of several of plaintiffs' witnesses who testified that from their casual observations of motor vehicles (such as while surf casting or on the way to a Fire Island Inn), that there was virtually no NPS enforcement.

The record clearly shows that NPS has given motor vehicle enforcement top priority and that enforcement has been improving. There has been a marked increase in the past three years of NPS personnel assigned to enforce motor vehicle regulations. In 1972, at the Kismet checkpoint, one NPS employee was assigned to motor vehicle enforcement. In August 1973, two employees were assigned to the Kismet area with one of their primary responsibilities being the enforcement

of motor vehicle regulations. In the summer of 1974, on the western portion of the Seashore which includes Kismet, there were four permanent and three seasonal employees who have had as one of their primary responsibilities motor vehicle enforcement (Johnson, p. 661 l. 17 - p. 662 l. 4). On the eastern portion of the Seashore, this past summer, four permanent and five seasonal employees have had as one of their primary responsibilities motor vehicle enforcement. (Ott, p. 596 l. 17 - p. 597 l. 6). This past summer, the Kismet checkpoint has been manned at least 6-8 hours each day (Johnson, p. 664 l. 17-25). Illegal motor vehicle use on the Seashore is declining because of improved motor vehicle enforcement and especially at the critical Kismet check point (Ott, p. 598 l. 23 - p. 598 l. 18).*

NPS has taken steps to limit the use of official and utility vehicles on the Seashore. NPS personnel have been instructed to reduce their trips on the Seashore by motor vehicle. While the number of NPS personnel enforcing motor vehicle regulations has increased over the past three years, the number of motor vehicle patrols has

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* The Town of Islip has enforced a strict ban on summer motor vehicle traffic within the Islip portion of the Seashore, the area of the Seashore where plaintiffs have homes and are primarily concerned with. As a practical matter, private motor vehicle traffic on Federal property within Islip has been non-existant as the Islip police are not permitting motor vehicles past the Kismet checkpoint, notwithstanding the fact that the vehicle may have an NPS permit. Of course, official NPS, county, town and village vehicles are not barred, and apparently plaintiffs concede that these official vehicles that provide essential health and safety services must be allowed on the Seashore.

remained constant (Ott, p. 594 l. 5 - 13). NPS horse patrols have been initiated to continue enforcement of motor vehicle regulations (Ott, p. 604 l. 13-23). In addition, from time to time, there are unscheduled night patrols on the beach (Ott, p. 603 l. 22-25).

The Suffolk County police have been instructed by NPS to limit their official motor vehicle use on the Seashore (Ott, p. 594 l. 17-22). Public utilities have been directed by NPS to leave their vehicles on the Seashore and to centralize their operations so as to cut down on the use of motor vehicles (Ott, p. 594 l. 23 - p. 595 l. 5).

NPS has two protected beaches where motor vehicles must travel through a delineated path and NPS lifeguards are authorized to enforce motor vehicle regulations (Ott, p. 604 l. 2 - 12). From 1972 to date, there have been no reported motor vehicle injuries to pedestrians (Ott, p. 604 l. 24 - p. 605 l.2).

On July 3, 1974, at the hearing, Ranger Ott testified of his then most recent beach patrol on July 2, 1974. The results of his patrol further evidence the positive effect of NPS enforcement of motor vehicle regulations on the Seashore. Ranger Ott patrolled in a vehicle from the Watch Hill beach on the easterly end of the Seashore to the Kismit checkpoint on the westerly end of the Seashore and then returned, travelling a total distance of 24 miles in approximately two hours. The only motor vehicles on the Seashore during this

patrol were local police and public utility vehicles. Not one private vehicle was seen on the beach during this two hour patrol (Ott, p. 601 l. 4 - p. 602 l. 23).

Between July 16, 1973 and July 22, 1973, NPS conducted a seven day, twenty-four hour crackdown at the Kismet checkpoint. This crackdown resulted in fewer non-permitted vehicles attempting to enter the Seashore at Kismet after July 22, 1973 (Ott, p. 599 l. 13 - p. 606 l. 6). In addition, the crackdown provided data on the number of motor vehicles entering and exiting the Seashore during a peak period of the summer and the number of each general category of usage. Schedule A, annexed hereto, which is a compilation of the data in the NPS logs maintained during the crackdown Government Exhibits D-D6 in evidence) indicates the total number of vehicles entering and exiting the Seashore for that seven day period in July, 1973. The schedule shows the actual number of different vehicles each day, the number of non-permitted vehicles attempting to enter the Seashore each day, and the type of vehicle usage, i.e., official, utility or private.

Not including turnbacks - those without NPS permits - approximately 49% of the total number of motor vehicles entering and exiting the Seashore were official vehicles including school buses and garbage trucks. Not including turnbacks, approximately 7% of the total number of motor vehicles entering and exiting the Seashore were operated by Lilco or Bell Telephone. Not including turnbacks, approximately 43% of the total number of motor vehicles entering

and exiting the Seashore were private vehicles which may have included private service vehicles such as plumbers, electricians, etc. The number of turnbacks who were refused entry by the NPS drastically dropped the fourth through seventh days of the crackdown as compared with the first three days. This is further corroboration of the fact that NPS enforcement efforts are proving successful. Judge Dooling found that this data shows that "permitted uses by private vehicles are not numerous... "and..." that a good many of the transits are by the same vehicle going and returning". Memorandum and Order, pages 11-12. In 1974, as a result of increased and improved NPS enforcement, along with stricter enforcement by the Town of Islip, the number of motor vehicles on the Seashore has reduced drastically.

The existing regulations which have been in effect since 1968 represent the status quo. There is no hard scientific data on the environmental consequences of altering the existing motor vehicle regulations and an injunction against NPS administration of the existing regulations would be tantimount to altering the existing regulations. The conclusion of plaintiffs' witnesses, Dr. Coates and Mr. Shuberth, that motor vehicles are undesirable on the Seashore is supported by NPS, as evidenced by Mr. Wagers' testimony and the numerous NPS documents offered by plaintiffs. However, at present there is at most sketchy data supporting

the premise that motor vehicles are harmful to the Seashore.

Dr. Coates testified and all will agree that human presence on the Seashore contributes ecological change, whether it be a motor vehicle or a reckless pedestrian trampling a dune. However the prime purpose of the Seashore Act is to preserve the Seashore for the use of the public. The quantification of the detrimental aspects of motor vehicles to the Seashore is not known. Equally unclear is the extent of the harm that may result from the increased pedestrian traffic and increased ferry boat traffic on the Great South Bay that would result if motor vehicles are banned from the Seashore. Data is sparse on the compaction of sand and ruts caused by motor vehicles. Dr. Wolff, intervenors' witness, is of the opinion that basically there is no harm to the beach and sand by motor vehicle caused ruts. (Wolff, p. 648 l. 11-p. 649 l. 14).

The book, Coastal Geomorphology, edited by Dr. Coates and published in 1973, contains an article by a former student of Dr. Coates, Kenneth Ruzyla, in which Mr. Ruzyla concludes that the portion of Fire Island that he studied in 1971 was not affected by human activity. Ranger Ott saw pedestrian paths, motor vehicle ruts and motor vehicles in this area as far back as August, 1972. Thus, there is confusion as to the consequences of motor vehicles, indeed pedestrian traffic on the Seashore.

As Judge Dooling noted, NPS staff are currently preparing a master plan which is a long range management aid that will outline the future course of NPS involvement on the Seashore. Memorandum and Order, page 2. NPS regulations require that an EIS accompany the master plan. Departmental Manual, Part 516, Chapter 2, 37 Fed. Reg. 4373 (1972). Part of the master plan and EIS will deal with proposed motor vehicle regulations in the context of the overall ecological system and overall plan. The master plan and EIS are scheduled for completion on or about January 1, 1975, at which time the public's comments will be invited. NPS policy is to avoid piecemeal actions, especially in a delicate interdependent ecological system such as Fire Island. NPS recognizes that it would be folly to prematurely enact new motor vehicle regulations that may conflict with the master plan and EIS.

ARGUMENT

JUDGE DOOLING PROPERLY EXERCISED HIS DISCRETION IN REFUSING TO ENJOIN FEDERAL DEFENDANTS

The sole issue before this Court is whether Judge Dooling "clearly abused his discretion" in declining to preliminarily enjoin Federal defendants. Exxon Corporation v. City of New York, 480 F.2d 460 (2d Cir. 1973), citing Dino De Laurenties Cinematografico S.p.A. v. D-150, Inc., 366 F.2d 373, 374 (2d Cir. 1966); Saxe v. United States, 471 F.2d 1293, 1296 (2d Cir. 1972).

In Gulf & Western Industries, Inc. v. Great A&P Tea Co., Inc., 476 F.2d 689, 692 (2d Cir. 1972), this Court set forth the standards for a preliminary injunction. It is a twofold requirement of (1) demonstrating probability of success on the merits and (2) a showing that irreparable harm will result if such relief is denied. Pride v. Community Sch. Board of Brooklyn, New Sch. Dist. #12, 482 F.2d 257 (2d Cir. 1973); Stark v. New York Stock Exchange, 466 F.2d 743 (2d Cir. 1972). An examination of the facts of this case in light of this twofold standard shows that Judge Dooling correctly refused to enjoin Federal defendants.

POINT I

PLAINTIFFS HAVE NOT DEMONSTRATED PROBABILITY OF SUCCESS ON THE MERITS AS NEPA DOES NOT APPLY TO NPS ADMINISTRATION OF THE EXISTING MOTOR VEHICLE REGULATIONS CONTAINED IN 36 C.F.R. §7.20 ET SEQ.

A. NEPA does not apply retroactively.

The existing motor vehicle regulations were promulgated in 1968, two years before the 1970 enactment of NEPA. NEPA does not apply retroactively to these regulations. In San Francisco Tomorrow v. Romney, 472 F.2d 1021, 1024 (9th Cir. 1973), it was held that NEPA does not apply to a HUD contract entered into prior to 1970 even though the terms of the contract, were to be carried out after the effective date of NEPA. For purposes of NEPA, the major Federal action in the instant case took place in 1968 when NPS promulgated the regulations. Another major Federal action is about to take place; the issuance of a master plan for the Seashore; and an EIS will accompany the master plan. Also, see Concerned Citizens of Marlboro v. Volpe, 459 F.2d 332, 335 (3d Cir. 1972); and Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613 (3d Cir. 1971), where it was held that since Federal approval of highway construction took place before NEPA, no EIS was required on construction and other Federal actions taking place after the effective date

of NEPA. But see Arlington coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972), cert. denied sub nom., Fugate v. Arlington Coalition on Transportation, 409 U.S. 1000 (1973) where a conclusion contrary to Concerned Citizens of Marlboro and Pennsylvania Environmental Council was reached as to ongoing road construction taking place after the effective date of NEPA.

While the road construction cases are not necessarily distinguishable as to each other, they clearly are distinguishable from the NPS administrative act of issuing motor vehicle permits on the Seashore pursuant to pre-NEPA regulations. In Arlington Coalition on Transportation, supra, ongoing construction was at such a stage that it could be halted and an EIS would have been meaningful as to the remainder of the work to be completed. Arlington Coalition on Transportation, supra at 1330. Thus, the "stage" of the alleged major Federal action is crucial in determining if NEPA applies. In the instant case, the "stage" is premature. Not until the master plan is finalized will an EIS on the master plan and the accompanying new motor vehicle regulations be meaningful.

A piecemeal EIS like piecemeal actions is potentially harmful. The Seashore is an interdependent ecological system and for each action there is a potential reaction. Thus, an EIS on the existing regulations or court ordered interim

regulations without consideration of the long range plans for the Seashore could not possibly comply with the full disclosure requirement of NEPA, but would be a narrow, incomplete, piecemeal approach. The logical stage for preparing an EIS is when the master plan, which will include motor vehicle regulations that are consistent with the contents of the long range master plan, is completed. At this time, full disclosure is impractical as it is impossible. Thus, retroactive application of NEPA to the existing regulations is unwarranted.

B. NPS administration of existing motor vehicle regulations is not a "major Federal action".

Arguendo, even if NEPA were to apply to the existing regulations, NPS issuance of permits for motor vehicle use on the Seashore is not a "major Federal action" and therefore an EIS is not required.

> There is no doubt that the Act [NEPA] contemplates some agency action that does not require an impact statement because the action is minor and has so little effect on the environment as to be insignificant.. Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir. 1972), hereinafter Hanly I.

Clearly, the issuance of motor vehicle permit on an individual basis is not a major Federal action. It would be absurd to require an EIS on the issuance of individual motor vehicle permits. Plaintiffs are really not complaining about

the administrative act of issuing individual permits. Plaintiffs are complaining about regulations that they claim are too liberal. In essence, they seek to rewrite the regulations.

NPS concedes that the promulgation of motor vehicle regulations that authorize motor vehicles on the Seashore constitutes major Federal action. Thus, it is the regulations that must be the subject of an EIS. In the EIS, the acceptable thresholds of motor vehicular use on the Seashore will be examined. The "go ahead" power referred to by this Court in its affirmance of Judge Doolings' denial of plaintiffs' motion for a preliminary injunction as to items (a) through (e) will be the promulgation of new motor vehicle regulations, not NPS issuance of permits on an individual basis. Biderman v. Morton, 497 F.2d 1111 (2d Cir. 1974).

In determining whether Federal action is major, courts have used the criteria of "substantial planning, time, resources, or expenditure." Natural Resources Defense Council, Inc. v. Grant, 341 F.Supp. 356, 366-7 (E.D.N.C. 1972); Hanly I Supra, at 644. See generally 6 U. Mich. Journal of Law Reform 496 (1973). The amount of planning, time, resources and expenditure of money in administrating the existing regulations is minimal and cannot be compared with that involved in other examples of major Federal action such as the construction of the Federal Correction Center in

Hanly or the Army Corps of Engineers channelization of 66 miles of a stream of Grant. However, the proposed master plan will involve substantial planning, time, and expenditures of money, and an EIS will be prepared on that master plan which will include new motor vehicle regulations.

Plaintiffs complain that motor vehicle operators travel over dunes and vegetation. This is done by private non-federal individuals in violation of NPS motor vehicle regulations. These violations are clearly not "major Federal actions". See Minnesota PIRG v. Butz, 358 F.Supp. 584 (D. Minn. 1973), aff'd 6 ERC 1694 (8th Cir. 1974), where it was held that the granting of eleven contracts to private parties by the Department of Agriculture to conduct logging activities on vast national wilderness acreage was a major Federal action. Clearly, the issuance of motor vehicle permits cannot be likened to logging vast acres of wilderness where the permit itself authorizes devastation. The NPS threshold determination that NEPA does not apply to its administration of the existing regulations is reasonable and is not arbitrary, capricious, an abuse of discretion or not in accordance with Hanly v. Kleindienst, 471 F.2d 823, 829-30 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) (hereinafter "Hanly II").

The NPS determination to prepare an EIS on its master plan is quite reasonable. This decision is in line

with Scientists Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973), where it was held that NEPA applied to the fast breeder nuclear program of the Atomic Energy Commission and that an EIS was required on the overall program before actual construction of separate reactors began. NPS policy is to prepare an EIS on its overall plan for the Seashore. Thus, the timing of the EIS is really the only issue remaining in the instant case as NPS has agreed to prepare one. However, since the master plan has not yet been completed, the time is not ripe to prepare an EIS. The Court in Scientists Institute for Public Information, Inc. noted that:

> In the early stages of research, when little is known about the technology and when future application of the technology is both doubtful and remote, it may well be impossible to draft a meaningful impact statement. Predictions as to the possible effects of application of the technology would tend toward uninformative generalities, arrived at by guesswork rather than analysis. NEPA requires predictions, but not prophecy, and impact statements ought not to be modeled upon the works of Jules Verne or H. G. Wells. 481 F.2d at 1093.

POINT II

PLAINTIFFS HAVE FAILED TO DEMONSTRATE IMMEDIATE IRREPARABLE HARM.

NPS along with local officials are involved in a rigouous law enforcement effort to limit the number of motor vehicles on the Seashore and to restrict their movement on the Seashore. As Judge Dooling observed:

> ...what is perfectly clear is that absent revised vehicular traffic regulations there is no vacuum of applicable law and regulations. Memorandum and Order, page 3.

The existing regulations have served to limit the use of vehicles on the Seashore. The evidence at the hearing clearly demonstrated that there has been a reduction in the number of motor vehicles on the Seashore over the past four years. Judge Dooling concluded that

> "Fire Island is not now a prey to unregulated motor vehicle traffic. Motor vehicle traffic is not, as plaintiffs assert... destroying the Seashore. That is not, on the evidence, the fact" Memorandum and Order, page 3.

After four days of evidentiary hearings, plaintiffs were unable to show any immediate irreparable harm to the Seashore as a result of the existing regulations. Plaintiffs' distaste for motor vehicles and their displeasure with NPS administration of the Seashore is not a basis for the drastic relief of an injunction.

POINT III

THE PUBLIC INTEREST REQUIRES THAT AN INJUNCTION NOT ISSUE AGAINST FEDERAL DEFENDANTS

Any substantial alteration of the existing regulations in the absence of an EIS should not be allowed. A motion for a preliminary injunction is in large part directed to the discretion of the court. Balancing of the essential facts and equities should include consideration of the purpose of NEPA. The purpose of NEPA is full disclosure of possible environmental effects of any proposed major Federal action before such action is undertaken. Under NPS policy, new motor vehicle regulations require an EIS.

A ban on motor vehicle traffic on the Seashore will have the real and practical effect of substantially altering the existing regulations. Such a ban would not preserve the status quo, which is the clear purpose of injunctive relief. On the contrary, new patterns of pedestrian traffic would develop. It is very possible that more dunes would be trampled by pedestrians and more vegetation in the back dune area would be destroyed by increased pedestrian traffic. The environmental consequences of increased ferry traffic on the Great South Bay that would be required to fulfill the void caused by the vehicle ban are also not known.

NEPA does not authorize guessing as to which modes of transportation are best. NEPA requires full disclosure and supporting data. Without an EIS, the status quo as manifested in the existing regulations should be maintained. See City of New York v. United States, 337 F.Supp. 150 (3 judge panel E.D.N.Y. 1972); 334 F.Supp. 929 (E.D.N.Y. 1972), where it was held that ICC approval of a railroad abandonment required an EIS because NEPA requires full disclosure of the environmental consequences of such an abandonment including considering alternative modes of transportation and their environmental consequences. This is not to say that courts should not grant injunctive relief in NEPA cases. However, affirmative relief that substantially changes the status quo is not a proper use of injunctive relief, particularly in a NEPA case where such relief absent an EIS ignores the purpose of NEPA.

To order an EIS on existing or interim regulations would be an unfair burden on NPS management. This was recognized in Minnesota Pirg v. Butz, supra, 358 F. Supp. at 622.

> It should be pointed out that there is no evidence that it would have been impractical for the Forest Service to file an impact statement in relation to its continuing administration of timber sales....

In the instant case, an EIS on existing or court-ordered interim regulations will be impractical and a hardship. NPS staff are concentrating their effort on the master plan and EIS. Since an EIS on existing regulations would take as long as the EIS on the master plan, (Wagers p. 469 9 - p. 478 l. 10) and in view of the lack of evidence showing irreparable harm to the Seashore due to the existing regulations, and noting the effective NPS enforcement of these regulations, it makes no sense to have interim regulations.

Plaintiffs' displeasure with the existing motor vehicle regulations is no basis for the granting of a preliminary injunction. Plaintiffs will have their chance to be heard when public comments are invited by NPS when the final draft master plan is completed on or about January 1, 1975. See Gage v. United States Atomic Energy Commission, 479 F.2d 1214 (D.C. Cir. 1973), where the court recognized that alternative administrative remedies such as rule-making hearings were available to petitioners and the court held those alternative administrative remedies were more appropriate than judicial relief.

The vast majority of vehicles on the Seashore are public service vehicles providing vital services (see Schedule A). The public interest requires that these public

service vehicles be allowed to operate under the existing regulations.

> Unfortunately, the insults to the terrain can be and doubtless are committed by permitted vehicles - waste removal, freight delivery, public utility service and police vehicles - as well as by illicit ones, and the trespasses can take place at unpermitted hours simply because of the difficulty of patrolling the whole island, even with the conbined effort of Islip, the Suffolk County Police and the National Park Service Rangers. The Park Service guidelines makes it plain enough that there is no intention to permit such trespasses to the terrain, and the extent to which it occurs and can be laid to illicit and unnecessary vehicular transits is not clearly enough established to authorize judicial interference with a manifestly well-intentioned governmental effort to prevent such abuse of the Island. Memorandum and Order pages 14-15.

While plaintiffs complain that the regulations are too liberal, and intervenors complain that they are too strict, the regulations are in fact reasonable and strike a balance between the various competing interests. To avoid chaos, and in view of the near completion of the master plan, new regulations and EIS, the existing regulations should remain in effect.

POINT IV

INTERVENORS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION AGAINST FEDERAL DEFENDANTS

Intervenors complain that the NPS in refusing to grant them permits where adequate ferry service is available to them amounts to a denial of due process and equal protection under the United States Constitution. In addition, intervenors claim that they have a prescriptive right to travel over Federal property (formerly the "Greenberg Estate") to their community.

Under 36 C.F.R. §7.20(a)(i), the Superintendent of the Fire Island National Seashore is given discretion in the issuance of permits:

> The Superintendent is authorized to establish a system of permits consistent with the requirements of these regulations. Any person firm, corporation or partnership may apply to the Superintendent for a permit using a form to be provided for that purpose. Before granting the permit, the Superintendent shall consider whether or not the nature and extent of the intended use is consistent with the purposes of the regulations in this part, which are to protect the Seashore lands and interests therein, to protect the health and safety of members of the public using the Seashore and to provide for the recreational use of motor vehicles for activities such as sports fishing and hunting in areas and at times

> which do not conflict with the conservation of the natural resources of the Seashore. On this basis, the Superintendent may approve the application, deny the application or grant the application with appropriate limitations and restrictions.

Over the past four years NPS has determined that the number of vehicles on the Seashore should be reduced. This decision is within the discretion of NPS who is charged with preserving the Seashore under the Seashore Act. NPS' desire to cut down on motor vehicle use bares a reasonable relationship to the purposes of the Seashore Act. NPS application of the regulations to Intervenors and the requirement that there be no adequate ferry service before a permit issues is reasonable and fair.

With reference to Intervenors' claim to a prescriptive easement over Federal property situated between the former Coast Guard station and the community of Kismet (formerly known as the "Greenberg Estate"), the evidence as Judge Dooling correctly found shows that the Greenbergs did not acquiesce in the trespasses over their property and thus, there can be no prescriptive easement. Memorandum and Order, page 20. In addition, the law is well settled that there can be no prescriptive easement over Federal property. Blash v. Sowl, 309 F. Supp. 909 (D. Wis. 1967).

CONCLUSION

Judge Dooling correctly denied the plaintiffs' motion for a preliminary injunction against Federal defendants and his decision should be affirmed.

Respectfully submitted,

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S C H E D U L E "A"

	7/16/73	7/17/73	7/18/73	7/19/73	7/20/73	7/21/73	7/22/73
Official *	39	52	39	39	74	36	37
Tri-Communities (Private) **	17	12	12	14	8		
All East of Seabay Beach (Private)	38	34	49	38	15	5	8
Service (Private)	12	14	15	19	7	1	
Total (Private)	67	60	76	71	30	6	8
LILCO	8	2	3	3			
Bell Telephone	9	3	9	9	3	2	2
Garbage	9	12	2	2	3	4	
School Bus	1	2	3	5	2		
Turnbacks	17	9	12	5	1	7	7
Totals	150	140	144	134	113	55	54
Total Number of Different Vehicles	80	73	91	80	68	31	36

* Official traffic includes vehicles from Suffolk County Police Department, National Park Service, Long Island State Park Commission, Town of Islip and the Coast Guard.

** Tri-Communities are the three most westerly communities consisting of Lighthouse Shores, Kismet and Seabay Beach.

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 25th day of Sept. 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

(See Attached)

Sworn to before me this
25th day of Sept. 1974

Notary Public, State of New York
No. 24-6522755
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

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